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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

JOHN FRANZESE, also known as "Sonny," WILLIAM DAVID CRABBE, also known as "Red," JOHN MATERA, also known as "Johnny Irish," NICHOLAS POTERE and JOSEPH M. FLORIO, also known as "Whitey,"

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, John Franzese, William David Crabbe, John Matera, Nicholas Potere and Joseph M. Florio, jointly pray that a writ of certiorari issue to review the judgment, as to each of them, of the United States Court of Appeals for the Second Circuit entered in this case on March 25, 1968 (Appendix C hereto, *infra,* pp. A28-9).

Citations to Opinions Below

The unreported opinion of the Court of Appeals, —— F. 2d ——, affirming the judgments of conviction herein is printed in Appendix A hereto, *infra,* p. A1 to p. A24.

Jurisdiction

The judgment of the Court of Appeals was entered on March 25, 1968 (Appendix C hereto, *infra*, p. A28 to p. A29).

On April 19, 1968, Mr. Justice HARLAN signed an order granting petitioners an extension of time within which to file the instant petition to and including May 24, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented for Review

1. Were petitioners denied a fair trial when the prosecution gave over to defense counsel an item of "3500" grand jury testimony which testimony, unbeknownst to the defense, had been coached by the prosecution to omit any reference therein that the Government witness in question feared the petitioners? Having thus tampered with, influenced, and limited the grand jury testimony of a Government witness regarding the element of fear, was it not unfair for the prosecutor to attempt to rehabilitate that witness at the instant trial by eliciting testimony from him that his contradictory statements in a previous trial were caused by fear of the petitioners as members of organized crime? Were not defense counsel prejudicially misled by the production of the aforesaid "3500" grand jury material consciously omitting any reference to the concept of fear, and was not the defense thereby invited to cross-examine the Government's witness without having to risk his rehabilitation through explanations offering fear as the reason for his prior inconsistent testimony? In the situa-

tion presented, should not the Government have been estopped to claim fear of the petitioners as a basis for prior contradictory testimony? At the very least, should not the Government have been required on this turnover to have forewarned defense counsel that the grand jury testimony in question had been deliberately coached so that no reference to the issue of fear of petitioners or their alleged connections with organized crime was made therein?

2. Were petitioners denied due process and the right of confrontation when Government witnesses, in the course of their rehabilitation, were permitted to testify that, owing to alleged representations made to them by third persons, they feared petitioners because of petitioners' alleged rank and power in the world of organized crime? Was not the vice of such testimony intensified where that testimony was completely unexplicated by any verifiable or tangible instance of injury or threat?

3. Whether the admission of

(a) evidence of a conspiracy of silence and concealment in return for aid to arrested defendants and their families, which was not charged in the indictment, and

(b) evidence of this uncharged conspiracy's existence at least a month after the termination of the 11-week period charged in the indictment,

so enlarged the scope and duration of the conspiracy as to constitute, separately or jointly, a variance between indictment and proof in violation of the Fifth and Sixth Amendments and Fed. R. Crim. P. 7(c).

4. Were the petitioners denied a fair trial by reason of the court's refusal to allow the defense to ascertain the identity of the informants who named Mrs. Cordero as a participant in the robberies?

5. Was the arrangement entered into between the Government and its witnesses respecting the considerations to be afforded in exchange for their testimony inculpating the petitioners so offensive to concepts of due process and a fair trial that the judgments of conviction should be set aside under the supervisory power of this Court?

6. Whether the Court of Appeals should have affirmed the judgments of conviction absent authoritative certification from the Department of Justice that no Government personnel engaged in or obtained any evidence or lead from any incident of electronic eavesdropping involving conversations by or relating to any of the defendants?

Constitutional Provisions and Statutes Involved

This case involves the Fifth Amendment due process clause; the Sixth Amendment right of an accused to be confronted with the witnesses against him; and Title 18 U.S. Code §3500 requiring the production of statements and reports of witnesses. With regard to the crimes charged against the petitioners in the indictment, the relevant statutory provisions are: Title 18 U.S. Code §2 (aiding and abetting), §371 (conspiracy) and §2113 (bank robbery and incidental crimes). These Constitutional and statutory provisions are quoted in Appendix D, hereto, *infra,* pp. A30 et seq.

Statement of the Case

The petitioners were charged in eight counts with crimes relating to the robbery of two federally insured banks in the New York City area, the receiving of proceeds of a bank robbery committed in Salt Lake City, and conspiracy. Proof in connection with these charges emanated from four Government witnesses who were themselves actual participants in some, or all, of these robberies.

The proof established that in the Fall of 1965, the Government's four bank-robber witnesses—ex-convicts and admitted bankrobbers by profession—were arrested by agents of the Federal Bureau of Investigation as a result of information supplied by informers and various eye-witnesses to the recently executed bank robberies. In the four months prior to their apprehension, they had terrorized banks in New York, Connecticut, Colorado and Nevada and on each occasion employed loaded weapons, disguises, get-away-cars, so called "switch cars" and various other sophisticated paraphernalia of crime utilized to escape identification and apprehension. Each of the four bandits, prior to arrest, had spent a substantial part of his life working at crime, and three of them had spent a substantial number of years, both as a youth and as an adult, in prison. While none of these bandits was much more than thirty years of age, the history of the quartet, as shown by their criminal records, correspondence and hospital records, revealed a commitment to violence, drugs, sadism and related forms of depravity.

All of the bandits had only recently emerged from prison and had joined together as hold-up specialists concentrating mainly on banks. They had chosen as their center of operations a Queens County (New York City) motel at

which premises they had secreted pistols, machine guns, ammunition and stolen vehicles to be used in connection with projected robberies.

The proof established—and the Government has conceded—that none of the petitioners herein was ever present at or near any of the robberies disclosed by the evidence. In this connection, the theory of the Government's case was that the petitioners were participants in the crimes charged only in the sense that they had planned the robberies and later shared in the proceeds actually stolen by the holdup men, Smith, Parks, Cordero and Zaher.

The Government's proof established that the robberies for which the petitioners were convicted were planned and executed during the period running from approximately mid-June, 1965 to on or about September 13, 1965. On September 30, 1965, three of the robbers—Smith, Parks and Cordero—were apprehended by federal agents. A few days later, the fourth member of the hold-up team, Zaher, was also apprehended. At first, each of the bank robbers denied complicity in any of the crimes charged. By reason of intensive interrogation, the gunmen, in stages, ultimately pictured for the authorities a variety of conflicting stories implicating themselves and others. However, at no time in the course of all of this preliminary and resultant investigation did any of the robbery principals implicate the petitioners herein.

The disclosures made by the robbery team describe three distinct stages of development. These stages clearly disclose the means by which each robber adjusted and dovetailed his story in order to earn special consideration from the Government as it became apparent that one or the

other of his colleagues in crime had achieved promises of Government favor more auspicious than his own. In this connection the record will reveal the following history of events:

The first robber to succumb to governmental persuasion was John Cordero whose statements to the authorities made it clear that the robberies in question were entirely attributable to himself and his aforementioned confederates, Smith, Parks and Zaher. In his story, Cordero recounted that the weapons used to commit the robberies had been cached at the Queens motel in a secret hiding place tended by the owner of the motel, Anthony Polisi. In Cordero's words, Anthony Polisi received small allowances, from time to time, for the safekeeping of the weapons—but was not himself a participant either in the planning or the execution of bank robberies.

When the news of Cordero's disclosures was made known to the other bank robbers, these three came forward with a new tale similarly—and admittedly—aimed at guaranteeing the good offices of the government in connection with their own plight. Accordingly, and in an effort to better the story given by Cordero, the three foisted upon the aforementioned Anthony Polisi the role of mastermind and technical director of the bank robberies, and also assigned to Polisi's young son, Salvatore, the role of occasional lookout. By virtue of this information, a grand jury sitting in the Eastern District of New York returned a spate of indictments separately charging the four bank robbers as defendants in connection with individual bank robberies and further separately charging Anthony and Salvatore Polisi in accordance with the information divulged by three of the four bank robbers.

Armed with this "evidence", the United States Attorney brought both Polisis to trial in January, 1966, upon charges of bank robbery and conspiracy. During this trial, the bank robber Cordero—who had relegated the senior Polisi in his FBI statements to the minor, if not innocuous, role of storer or guardian of weapons—was never called as a government witness. Upon the testimony of Cordero's confederates, however, both Polisis were convicted. The senior Polisi received a sentence of fifteen years imprisonment based upon his status as "mastermind" of the robberies. The younger Polisi was sentenced to a four year term of imprisonment.

As the Polisi trial neared its end, it became apparent to Cordero that he would not be called as a Government witness at that trial, owing to the fact that his pre-trial statements conflicted with the trial testimony and extra-judicial statements of Smith, Parks and Zaher. Overcome by the spectre of being excluded from Government consideration by virtue of this conflict in stories—rendering his testimony valueless—if not downright dangerous to the prosecution, he sought out the prosecutor and with the connivance of his erstwhile confederates—who likewise wished not to be outdone—delivered over to the United States Attorney a new tale, now transferring responsibility from themselves and the Polisis to the petitioner Franzese and the other petitioners named herein. With this information in hand, the prosecutor in charge of this and the related Polisi cases procured the instant indictment in April, 1966.

The convictions of the Polisis were affirmed in November, 1966, without the prosecutor advising the Court of Appeals of the new developments in the case which drastically revised the nature of the alleged conspiracy and the role therein of the senior Polisi.

Smith's Rehabilitation, His Testimony Concerning Fear of the Petitioners, and the Depiction of Petitioners as Members of Organized Crime (Questions 1 and 2, *supra*)

Petitioners were indicted in April 1966 by a grand jury sitting in the Eastern District of New York. The filing of this indictment very quickly became the occasion for a glut of newspaper coverage reaching far beyond a simple and straightforward disclosure of the criminal charges which had been returned. The identification and naming of petitioner Franzese as the alleged mastermind of a string of local, and out-of-state, bank robberies became the starting point for a torrent of lurid stories attributing to him senior status in the ranks of the Cosa Nostra and further describing him as a seasoned killer who had successfully "muscled" his way into an assortment of Long Island criminal enterprises suspected by law enforcement to operate only with so-called "mob" approval. Against this background, the attempt to select an impartial jury in Brooklyn was rendered futile. Inflammatory articles printed in local papers including the venerable New York Times, cast the petitioners into the role of Mafia gunmen. In order to escape a rising tide of newspaper and radio publicity fostering this terrible image, the petitioners sought, and were granted, in the midst of selecting a jury in Brooklyn, a mistrial and change of venue.*

---

* During the voir dire in Brooklyn relating to the selection of jurors, the Times reporter wrote an article disclosing Franzese's alleged status as a "boss" in the Mafia or Cosa Nostra. The article was published notwithstanding the Court's specific request to this reporter to avoid such reportage. Following the publication of the offending and prejudicial account by the Times man, Judge MISHLER excoriated this reporter by stating, ". . . Mr. Anderson . . . I just think what you did to this case is unforgiveable" (5377; see also 5371 *et seq.*). The Court subsequently granted a mistrial and change of venue (5400-1).**

**References are to the typewritten pages of the original record which has been certified and filed in this Court.

Thus—and most ironically—it was that petitioners and their counsel journeyed, upon the change in venue, to distant Albany only there to be exposed to rulings of the trial court which permitted the witness Smith and his bank-robber colleagues to nonetheless depict the petitioners as important and menacing operatives of organized crime.

In connection with the foregoing, it will be recalled, that in January, 1966 the Government's witnesses Smith, Parks and Zaher testified at the trial of Anthony Polisi and Salvatore Polisi denominating the senior Polisi as their bank-robbery overlord and attributing to him the genius and control of the entire operation. In March, 1966, following the conviction of the Polisis, Smith testified before a new grand jury there transferring the onus of the robbery ring's generalship to Franzese and his co-petitioners herein. At the same time, the Polisis were assigned minor roles in the crime enterprise. In that grand jury testimony Smith identified for the first time the petitioners herein as accomplices, receivers and bank robbery co-conspirators. The relevant portion of this grand jury testimony of Smith's is as follows (see pp. 845, *et seq.* and exh. 21 for id., p. 29):

> "Q. You have testified at a bank robbery trial already, is that right? A. Yes.
>
> Q. That was the case of the United States versus Salvatore and Anthony Polisi? A. Right.
>
> Q. Did you disclose any of this information to the federal government up to that time? A. No.
>
> Q. Why not? A. Because, as far as I was concerned, I was ready to go and take my just punishment. They would look out for my family and put up the bail money, and try and get me back out. And they just didn't do it, you know, they forgot all about it. And I felt I didn't owe them nothing no more."

Upon the conclusion of Smith's direct examination at the trial herein, his March, 1966 grand jury testimony, part of which is set out directly above, was turned over to defense counsel pursuant to Title 18 U.S.C. 3500. Upon this turnover, no forewarning was given to the defense that the testimony above quoted was falsely given pursuant to the direction of the United States Attorney in charge of the prosecution of this case. Defense counsel were thus supplied with the most recent and presumably candid explanation of Smith's failure to have previously identified petitioners as his robbery cohorts. It will be seen, that in the grand jury minutes quoted above not a word is said by Smith to the grand jury panel that he ever feared the petitioners. Indeed, Smith's expressed reason to the panel for then inculpating the petitioners was that promises of bail monies, lawyers' fees and support for relatives had never been furnished; that this constituted a breach of faith by the petitioners, and that by reason of their failure to stand by the claimed promises, Smith no longer felt a duty to protect the petitioners from discovery.

The specific delimitation by Smith in his March, 1966 grand jury testimony of his reasons for so lately inculpating the petitioners foreshadowed no reasonable risk that following his vigorous cross-examination, any attempt could be properly made to rehabilitate him by showing—as a completely different reason for his failure to initially inculpate the petitioners—that he was in mortal fear of them. Despite this fact, the trial court subsequently allowed redirect examination of Smith which produced testimony on his part excusing his contradictory testimony at the Polisi trial as having been generated by fear of the petitioners and their organized crime associates both in and out of

jail (1042, *et seq.*). Defense counsels' numerous and continuing objections to this fatal line of "fear" testimony depicting petitioners as Mafia overlords were to no avail. They did, however, produce a significant and shocking admission from the prosecutor to the effect that he had deliberately instructed the witness Smith prior to his March, 1966 grand jury testimony, to omit any reference to Smith's alleged fear of the petitioners as a reason for his tardy revelation of their complicity. Thus, the prosecutor advised the Court (1407-8):

> "Mr. Gillen: What this is, Your Honor, prior to these individuals—I make it a practice not only testifying before the Grand Jury but testifying in Federal Court, this statement that fear is a very critical thing, and I had a conversation with each of these individuals before they went into that Grand Jury and said 'Don't mention this organized crime in there; don't mention this killing business; don't mention the fear element.' and the same when these people had been put on the stand. That is the reason for this."

Once the Court had ruled that Smith could testify concerning his fear of the petitioners, the record was laid open for infection by substantial doses of general and hearsay testimony recounting Smith's fearful state of mind. In this connection, Smith's reportage generally depicted the petitioners as persons having associates "both in and out of prison" (1049) and otherwise indicated to the jury that he knew of circumstances where "these people . . . and conspiracies" had successfully carried out threats against informants, like himself, who were in jail. In addition, Smith recounted that various third persons had advised him during the period of his incarceration that his life would be in danger if he ever testified against the petitioners. With re-

spect to all of the foregoing testimony, the Government introduced not a whit of independent corroborative proof establishing an objective or verifiable basis for the witness' claimed fears. Regarding this, the trial court observed that it made no difference whether Smith's view of his own safety was predicated on any facts having objective reality (827) and, the court further stated that it was "immaterial whether or not" the concededly hearsay information which Smith might have been receiving in jail as regards the petitioners, was true or not (886). In this unique fashion the trial court dispensed entirely with any need for the prosecution to show preliminarily the slightest objective verification of the alleged facts urged by Smith as the basis underlying his claimed fears.

Variance Between the Indictment and the Proof Respecting the Scope of the Conspiracy (Question 3, *supra*)

The indictment alleged seven substantive counts of bank robbery and receiving [under 18 U.S.C. §2113(a), (c) and (d)] and in count VIII a conspiracy (18 U.S.C. § 371) to commit those crimes running from "on or about and between the 15th day of July 1965 and the 30th day of September 1965, both dates being approximate and inclusive. . . ." In neither the 35 overt acts alleged in the indictment nor the several bills of particulars submitted before trial did the Government suggest (a) that there was a conspiracy among the defendants to conceal the robberies and keep silence in return for bail money, lawyer's fees and money for arrested defendants' families, or (b) that both the conspiracy charged in the indictment and the second conspiracy just described continued beyond the indictment's September 30th termination date until at least the middle of No-

vember. Over repeated objections by defendants (*e.g.*, 1466-73), the Government introduced evidence which tended to show, in the prosecutor's own words, that this was "not the normal conspiracy . . . just to rob banks. . . . [H]ere, the very part [*sic*] heart of the conspiracy . . . is the conspiratorial agreement to give bail money and money for attorneys fees in return for silence and lack of information against the other conspirators . . ." (3241). Virtually the only evidence at trial not from the mouths of accomplices was the testimony of 2 lawyers, and that came in as proof of this second conspiracy and showed that it continued well into November and even December (*E.g.*, 2648-95; 2785-96). This evidence was *not* admitted as proof of acts in furtherance or corroborative of the conspiracy charged in the indictment, but solely as proof of a different conspiracy. The trial court charged the jury that despite the general principle that a conspiracy terminates when the principal objective is accomplished, since here there was proof of a conspiracy to aid arrested prisoners in return for their silence, the jury could bring in a verdict on the basis of that conspiracy and of evidence of its existence for a month after the September 30th indictment date (4142-3, 4149, 4150).

The Court's Refusal To Divulge the Identity of the Informant Who Had Named Mrs. Cordero As a Participant in the Robberies (Question 4, *supra*)

During the trial, the defense came into the possession of an affidavit sworn to by Special Agent Murphy of the FBI. Agent Murphy's affidavit had been submitted pursuant to an FBI application to the United States Commissioner of the Eastern District of New York for warrants of arrest for James Smith, John Cordero and Mrs. John Cordero. The Murphy affidavit described Mrs. Cordero as a principal in

at least two of the robberies charged in the indictment and related that a

> "prior reliable informant [advised] that the said Mrs. John Joseph Cordero was a driver of the car used in the [Oceanside] bank robbery on August 13, 1965."

The Murphy affidavit additionally advised that the same "prior reliable informant who had given him information in connection with the Oceanside robbery" had also given information that Mrs. Cordero's automobile had been used in the robbery of the County Federal Savings & Loan Association on June 17, 1965.

In their testimony at the trial, the bank-robbers had given substantial testimony to the effect that in the County Federal and Oceanside robberies the get-away driver was Anne Messineo and that, in each instance, the so called get-away car was a stolen vehicle. The affidavit of Agent Murphy gave considerable substance to the defense claim that Mrs. Cordero was a participant in the holdups. Cordero himself had communicated this fact before the trial to various FBI Agents. The likelihood of Mrs. Cordero's participation in the holdups was also heightened by the fact that she had been present in the vicinity of the Oceanside, Holyoke, Denver and Salt Lake City robberies when they occurred. Notwithstanding the attempts of counsel to establish her complicity, the robbers steadfastly denied her participation in the holdups.

Against the background of the foregoing testimony, the affidavit of Agent Murphy supplied the defense with a truly important vista regarding Mrs. Cordero's involvement in the robberies and the possibility of showing that all of

the gunmen, while confined in jail, had combined to form a perjury conspiracy.

More importantly, the jury had learned that Mrs. Cordero had received $10,000 originally seized from her household in connection with her, and her husband's, arrest on October 1, 1965. The return of those monies to Mrs. Cordero, with the consent of the United States Government and by order of the court, was tantamount to instructing the jury that Mrs. Cordero was innocent of any and all wrong-doing. That necessary implication, drawn from the return of the monies, seriously undermined the defense accusation that the gunmen and their women had combined in a plot to shift all responsibility to innocent persons. It was all important, therefore, that Mrs. Cordero's role in the robberies should have been fully explicated by any and all extrinsic evidence of her guilt which might have been available. Over objection of all of the petitioners, the court denied their application to have the identity of the informant or informants mentioned in the Murphy affidavit divulged. (3344, et seq.)

Concerning the Promissory and Financial Relationship Established Between the Government and its Witnesses (Question 5)

At the trial, on the conclusion of the direct testimony of each of the robbery witnesses, the Government turned over voluminous materials—mostly in the form of correspondence—indicating the extent to which the Government witnesses had taken control of the prosecution. In these papers, there is set forth in shocking detail recurrent reference to the "deal" which the witnesses were to be afforded in consideration for their testimony. Their correspondence with the United States attorney reveals not

only a particularized understanding that their testimony would earn them their freedom, but that if were they to be deprived of preferential conditions in jail living, they would quickly leave the Government without a case. In addition, the letters written by the Government's witnesses to the United States Attorney portray unbelievable arrogance, contempt and satisfaction in the knowledge of their value as witnesses in the Government's case.

It is against this background that one can readily understand the underlying reason for the special considerations afforded to the bank-robbery quartet while in prison and the ease with which they were able to demand and effect transfers from one federal facility to another. Beyond this, the record discloses that prior to the instant trial, the Government consented to the return of approximately $10,000. which had been taken by the F.B.I. from a suitcase found in the home of the Corderos. It was established at the trial that these monies were proceeds of the Salt Lake City robbery as certain serial numbers on bills seized corresponded with those recorded by the bank for security purposes. The return of these monies to Mrs. Cordero was allowed even though the F.B.I. was in possession of information from multiple sources indicating that Mrs. Cordero had actually been a participant in some of the robberies.

It was also established in various "3500" materials turned over to the defense that Cordero's bankrobber accomplices had received similar benefits from the Government. Accordingly, there was returned to Parks while he was in prison $3,500. representing the proceeds of a Cadillac sedan purchased by him shortly after one of the

robberies. He had purchased this vehicle by paying out $5,000. in cash. Similarly, Smith—who had conceded he had no legitimate means of support at any time while out of prison—was refunded the $800. value of a sedan taken from him when he was arrested.

Concerning Electronic Eavesdropping (Question 6, *supra*)

At a pretrial hearing on January 30, 1967, defense counsel informed the court they had learned of a wiretap by the New York City Police. In response to questions by the court, the Assistant United States Attorney stated that neither he nor his investigators had knowledge of the wiretap until informed at a prior related trial by other defense counsel and that the Government had "received no leads, no assistance, no evidence with any shape, manner or form from any electronic device of that type or any other type." (4946, 4950). Defense counsel did not pursue the possibility of electronic eavesdropping further.

However, in the light of intervening developments which revealed that eavesdropping was not an isolated practice and in particular of *United States* v. *Desist,* 384 F. 2d 889 (2d Cir. 1967), *cert. granted,* No. 909 October 1967 Term, 36 U.S.L.W. 3345 (March 4, 1968), where an almost identical representation by an Assistant United States Attorney proved false, petitioners made a new request for disclosure. In their brief on appeal (Franzese Brief, pp. 86-97), they requested the Department of Justice to certify after review of its files whether or not there had been any eavesdropping of which the Government had knowledge or obtained the fruits. Pending such certification, if necessary at the direction of the Court of Appeals, it was asked not to decide

the appeal. The Government refused to make any further representation concerning eavesdropping, terming petitioners' request a "bizarre" "fishing expedition." (Gov't Brief, pp. 89-90.) The Court of Appeals affirmed the convictions without such certification.

REASONS FOR GRANTING THE WRIT

I.

(Concerning Questions 1 and 2)

The instant case discloses, on the part of defense counsel, a continuing and assiduous effort to avoid the pollution of jury mentality by any reference to alleged Mafia involvement in the matter. Despite the attempts in this direction by defense counsel, which included a most expensive and disadvantageous change of venue, the Government managed to create a situation at the trial giving itself an apparent license to inject into the proceedings testimony tending to show that petitioners were important personages in the world of organized crime. The conduct pursued by the Government in achieving this result involved its wilful and deliberate direction to a witness that he testify differently from what the witness knew to be the truth. In this fashion, the witness Smith was directed by the Government to omit all reference from his grand jury testimony of the claimed fact that he was in fear of the petitioners by reason of their alleged connection and position in the ranks of organized crime. In the place of such testimony, Smith gave to the grand jury as his reason for failing previously to inculpate the petitioners a highly

vulnerable claim that they had failed to honor certain commitments to provide him with attorneys, bail and family support.

The contrived omission, at the specific behest of the Government, of any reference to the factor of fear was obviously meant to—and succeeded in—disarming the defense. By reason of the Government's controlled omission of testimony, the defense was induced to mount a conventional attack on the credibility of Smith with the apparent and seemingly well-founded assurance that the issue of fear and the alleged Mafia involvement of the petitioners could not be factors which might come into the case under the cover of witness rehabilitation. As shown above in the Statement portion of this petition, that legitimate expectation was torpedoed without warning when the trial Court gave its disastrous ruling to the contrary.

We urge this Court that in its supervisory power over the conduct of federal trials, it should not countenance prosecutorial misconduct of the sort involved here which embraced deliberate withholding of information from a grand jury and the turnover to the defense of a document (Smith's grand jury minutes) falsely purporting to be a true and authentic version of his testimony. It seems perfectly clear to us that a turnover pursuant to Title 18 U.S.C. 3500 of a statement of a witness which is known by the prosecutor to be false and designedly incomplete, on its face, is not bona fide compliance with the strictures of that statute. We further urge that the turnover of this 'counterfeit' grand jury testimony without warning to defense counsel of the highly material discrepancy relating to the issue of fear was a further act of suppression and interference with the evidence on the part of the prosecutor.

Even in the opinion of the Court of Appeals, the fundamentally offensive nature of the prosecutor's conduct is pointed out (see Appendix A, p. A14). Its prejudicial effect, however, is casually brushed aside upon the assumption that defense counsel would have proceeded the same way even had they been forwarned respecting Smith's alleged fear. Such an argument on the part of the Court of Appeals is presumptuously speculative. No such course involving the exposure of all of Smith's previous contradictory statements need have been hazarded by the defense. Instead, the defense could well have limited itself to a thorough examination of the motives of Smith and his colleagues in testifying for the Government.* The Court of Appeals' further observation that the defense proceeded to cross-examine Parks, Cordero and Zaher in the same fashion as Smith had been cross-examined omits any true appreciation of the climate which had, by this time, developed at the trial. Once Smith's extensive testimony suggesting Mafia involvement on the part of the petitioners had come into the case, damage to the defense cause had been inflicted in doses too massive to overcome. The jury mentality in regard to petitioners' involvement in organized crime was inalterably fixed by the time Smith concluded his testimony. In this situation, it can hardly be urged with fairness that the relatively delicate, if not actually shy, cross-examinations of the other bankrobbers regarding their previous inconsistent statements evidenced an uncaring attitude respecting the issue of fear as it affected the defense. Finally, we are truly non-plussed at the statement

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* Correspondence from the accomplices to the U.S. Attorney indicating their understandings in regard to special consideration on sentence and other benefits was available to the defense in voluminous quantity.

made in the opinion of the Court of Appeals that the statement of the prosecutor acknowledging his tampering with the grand jury testimony of Smith was "made in the heat of courtroom argument" and that "it would be wrong to take the quoted statement . . . as an admission that the prosecutor had done this." (Appendix A, p. A14) Any objective reading of the statement of the prosecutor respecting the fact of his testimonial direction to Smith makes it quite clear that the prosecutor's admission in this regard was perfectly candid and not the result of a heated and erroneous outburst. That fact is borne out by the subsequent examination of Smith by the prosecutor in which the witness was asked by the prosecutor whether he had had a conversation "with me" regarding fear "prior to testifying before the [March, 1966] federal grand jury" (1417-8). In this connection, it is also most pertinent that at no time during the trial following the disclosure by the prosecutor of his manipulation of the Smith testimony did he ever claim that his assertions to the court respecting this were other than true or that they had been triggered by false recollection in the heat of argument.

We also urge that the conduct of the prosecutor described herein inevitably exposed the petitioners to uncontrovertible claims of alleged Mafia involvement. Smith's assertions that he had received communications from third persons allegedly indicating his exposure to reprisal presented no target at which the petitioners could level any fire. Concerning the truth of these alleged communications indicating petitioners' status as underworld figures, the court instructed the jury that the truth or falsity of petitioners actual criminal status was irrelevant. All that was material, instructed the trial court, was Smith's alleged fearful

state of mind. In this manner, the way was laid open for the prosecution to show by hearsay and innuendo that the petitioners were important criminal personages. No direct, relevant, or legally admissible testimony probative of petitioners' underworld employment or their projection of threats was ever adduced to the jury. The panel was, however, freely permitted to speculate on these subjects and the petitioners were at all times without any evidentiary target upon which they could center some contradictory salvos. By this device, petitioners were deprived of their Sixth Amendment right of confrontation and their Fifth Amendment entitlement to due process of law. No single factor visited greater prejudice upon the petitioners' case than their exposure to the jury, as indicated herein, as members of organized crime. To have been so denigrated, without having themselves taken the stand, constituted a mockery of the concept of a fair trial.

We also urge that it was highly prejudicial error for the trial court to have permitted testimony concerning fear without at the same time requiring adherence to a standard showing some objective verification for both the claimed mental state and the facts alleged by Smith to have produced it. At the very least, in a case involving strong suggestions to the jury of Mafia participation, there should have been a threshold showing that Smith's alleged fears had some objectively verifiable basis. Our review of the cases in the Court of Appeals gave an extremely strong indication that in all considered opinions on the subject, there was shown independent circumstances giving rise to the claimed state of mind (*People* v. *Buchalter*, 289 N.Y. 181 and see *Carbo* v. *United States*, 314 F. 2d 718). Thus, for example, in the *Buchalter* case, there was ex-

trinsic verification of the fact that the fear-ridden witness there had actually been shot through the head in order to insure his silence. And, in *Carbo,* it will be seen that the record and opinion is rife with instances of specific threats to kill and harm and some of these threats are on minifon tapes, and in the testimony of persons having no vested interest in the case. The case of *United States* v. *Scandifia* (—— F. 2d ——, decided, Jan. 31, 1968) relied upon by the Court of Appeals in its opinion is inapposite to our discussion here. *Scandifia* involved a situation in which the defendant himself actually imparted the menacing instructions directly to the witness.

In our view, there is no beacon authority in the federal courts coming directly to grips with the issues posed under this heading. We urge, therefore, that it is timely and appropriate for this Court to now set forth guidelines to be applied in cases alleged to involve organized crime which will delimit the Government in its presentation of proof aimed at showing that defendants have inculcated fear in the minds of Government witnesses. Unless some standard requiring objective verification of such claimed fears is required, convictions based upon reputation rather than objective and persuasive proof will become the order of the day.

II.

(Concerning Question 3)

The admission of evidence which expanded the scope of the conspiracy from the indictment's charge of an agreement to rob banks and receive the proceeds to encompass a second conspiratorial purpose—silence and concealment of those crimes—and the admission of evidence which extend-

ed its duration at least a month beyond the 11-week period specified in the indictment raise fundamental Fifth and Sixth Amendment questions and questions of federal criminal procedure in the context of another serious issue in its own right—the limits of the crime of conspiracy.

This Court has not had occasion to treat the issue of variance between indictment and proof since 1962 in *Russell* v. *United States,* 369 U.S. 749, and *Stirone* v. *United States,* 361 U.S. 212 (1960), and then in circumstances not directly applicable to the main run of criminal prosecutions and in particular to conspiracy trials. Petitioners believe that the judgment of conviction is contrary to the principles of *Russell* and *Stirone* and that it is necessary for this Court to settle the application of those cases to the more common areas of federal prosecution. The basic question to be resolved is the extent to which the Government may vary its proof at trial from its statement of the essential facts in the indictment, required and defined by the Fifth Amendment and Fed. R. Crim. P. 7(c). The answer also involves the extent of a defendant's Sixth Amendment rights to be apprised of the nature and cause of the accusation he must be prepared to meet and to prevent his retrial for the same offense.

The seriousness of the variance and its significance to this Court are heightened because the variance arises in the context of a conspiracy prosecution. The questions raised involve extension of the duration and enlargement of the purposes of the conspiracy charged in an indictment. This Court in *Krulewitch* v. *United States,* 336 U.S. 440 (1949), *Lutwak* v. *United States,* 344 U.S. 604 (1953), and *Grunewald* v. *United States,* 353 U.S. 391 (1957), expressed

concern with the amorphous and elastic nature of the crime of conspiracy. In each of those cases this Court taught that a conspiracy to conceal the principal objective of a conspiracy after it is achieved or fails is not an implied part of that conspiracy, but a separate conspiracy. Petitioners contend that the judgment below conflicts with the teaching of those cases. The Court of Appeals sidestepped the issue, completely ignoring that the conspiracy to conceal the substantive crimes and aid arrested defendants was not even suggested in the indictment. Thus, the only variance it professed to find (and held immaterial) was between the indictment's termination date and the proof of a conspiracy for a month thereafter. The *Krulewitch, Lutwak, Grunewald* trilogy show that in conspiracy cases the stakes are often the highest and hence the temptations to the Government the most difficult to resist. Yet, to defendants, conspiracy is often the most difficult crime to rebut; and the proof at trial—hearsay from accomplices—is at once the most damning and the most unreliable. All those characteristics fit this case. Petitioners therefore believe that in the general application of the point raised to all criminal cases, and in particular to conspiracy cases, as well as because of the gravity of the error and the seriousness of its consequences to them, the writ should be granted.

III.

(Concerning Question 4)

Divulgence of the identity of the informant(s) referred to in the Murphy affidavit was essential if the defense was to have been given any real opportunity to reveal the testimony of the bankrobber witnesses as a fraud.

We claim, that in a case of this sort—so dependent upon inbred and controlled proof—it was grave error for the Court to close off the possibility of an inquiry through the informer into the issue of Mrs. Cordero's complicity, and the larger issue relating to a plot to substitute the petitioners as the robbery ring leaders. Notwithstanding the special needs of the defense to probe more deeply with the informant for information establishing their own innocence; notwithstanding the utter paucity of the Government's essentially endogamous proof; and without any regard for truly balancing the competing interests claimed by the Government on the one hand and the defense on the other, the court snapped shut the door of deeper truth. Having come upon such very strong indications that Mrs. Cordero was herself deeply involved in the robberies, it was incumbent upon the court to set aside the barriers which might normally have prevented the type of inquiry which the defense sought. By reason of the court's adverse ruling, a person, or persons, having intimate knowledge of the means by which the robberies were actually arranged was kept beyond the reach of the defense. The harshness of this result is immediately seen when it is considered that the persons protected were secret intruders into the clique run by the Government's own robbery-witnesses. We seriously question the propriety of shielding a set of Government informers whose testimony would be most objected to only by another group of persons who turn out to be actual principals in the crimes charged in the indictment. We ask, how can it be that the administration of justice should countenance the protection of one set of informers so that another such group (the robbery witnesses herein) may be given carte blanche to

fabricate completely self-serving stories. We contend, therefore, that the facts shown herein reveal a substantial constitutional issue relating to the obligation of the Government to make available to the defense all reasonable avenues of exculpation. As stated in *Roviaro* v. *United States*, 353 U.S. 60, 62:

> "Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege [against disclosure] must give way."

IV.

(Concerning Question 5)

The instant case presents for the Court's consideration the need to establish reasonable guidelines which will operate to control the Government in its wide ranging efforts to secure trial testimony in support of its prosecutions. Where, as here, the primary target of the Government is an individual most anxiously sought for conviction, a serious question arises concerning the extent to which the Government may be allowed to go by way of insuring the testimony of its witnesses. In the instant case, the Government, quite apparently entered into a "deal" with the robbery quartet which implied, even if it did not explicitly guarantee, the greatest possible consideration for testimony inculpating the petitioner Franzese and his co-defendants. Burdened by the absence of independent testimony establishing the guilt of the petitioners, the Government was effectively driven to make a

bargain with their alleged accomplices. Part of that bargain, it would appear, involved the shocking return of $10,000 in stolen bank funds, as well as the return of proceeds derived from the sale of valuable automobiles either purchased with the proceeds of crime or used in connection with the robbers general criminal endeavors.

One may well ask how far the Government should be permitted to go in providing itself with testimony to sustain convictions. The boundaries transgressed in this case by the Government, we say, took it far beyond the reasonable and honest limits which the due administration of justice might require. Here, the Government struck its bargain with the devils and then brought to bear upon the jury all of the pressures of assumed virtuous governmental concern to rationalize its conduct. The whole weight of 'establishment' virtue and public need was offered as a counter-balance to the repelling, offensive and heedless course of conduct taken by officialdom in dealing with the bankrobbers. Had any defense counsel undertaken to confer the benefits given here by the Government on any of its own witnesses, as a consideration for testimony, sure grounds for disbarment would have been established. A double standard respecting the price for testimony cannot be tolerated. Mere exposure to the jury of the fact of the Government's misconduct is not enough. Vigorous and certain means of discipline must be imposed to insure that prosecutors are not given a license to trade away the cash of victims for desired testimony—especially when that testimony is lacking in fundamental hallmarks of truth and is completely unsupported by independent evidence establishing guilt.

Our objection to the conduct of the prosecution respecting finances and witness consideration in this case was not completely ignored in the Court of Appeals. There, it was observed that the "Government's attitude strikes us as rather complacent"; . . . (Appendix A, p. A19). While the Court of Appeals could not, in all the circumstances, see its way clear to invoke necessary supervisory action, we respectfully urge that the Government's conduct in this case cries out for such sanction.

V.

(Concerning Question 6)

The occasions when and the manner in which the Government should be required to disclose whether there has been electronic eavesdropping related to a criminal prosecution is a matter which has recently been before this Court on several occasions. The matter is important since it involves potential infringement of Fourth, Fifth and Sixth Amendment rights as well as the appropriate standards of conduct of federal prosecutions.

Aspects of the disclosure policy with respect to eavesdropping announced by the Department of Justice in its Supplemental Memorandum, *Schipani* v. *United States,* No. 504 October Term 1966, 385 U.S. 372 (1966), and as it has subsequently evolved, *see, e.g.,* Brief for the United States in Response to Petition for Certiorari, *O'Brien* v. *United States,* No. 823 October Term 1966, *remanded* 386 U.S. 345 (1967), involve the supervisory power of this Court in several respects.

The fundamental question raised is whether the Government should be required to disclose whether eavesdropping

occurred only if petitioners can first show that the Federal Government has engaged in at least one instance of eavesdropping. This "red handed" test was asserted by the Government in its response to petitioners' request for disclosure in the Court of Appeals. Petitioners argued there that at least with respect to cases where some law enforcement agency had admittedly eavesdropped (here the New York police), in a case where organized crime is involved, and whose preparation preceded the Government's announced policy not to eavesdrop indiscriminately in future, the Department of Justice should be required to make the review and disclosure announced in *Schipani*. The scope of that review and disclosure, and to whom—the court or defense counsel—it should be made, is presently before this Court in *Kolod* v. *United States*, No. 133 October 1967 Term, *remanded, per curiam*, 36 U.S.L.W. 3306 (Jan. 29, 1968), *motion to modify order set for argument, id.* at 3365 (March 12, 1968).

The supervisory power of this Court is also involved in the issue of *when* the Department of Justice should review its files and disclose whether eavesdropping occurred. It would seem improper for the Department of Justice to refuse disclosure in a lower court, as it has here, only to have the Solicitor General make the response sought by defendants in answer to a petition for certiorari. Yet, this is what occurred in his Brief in Opposition for Petition for Certiorari, *Serman* v. *United States*, No. 320 October 1967 Term, *cert. denied*, 389 U.S. 843 (1967). Such a delay has at least three unfortunate consequences: It puts defendants to unnecessary delay, expense and perhaps incarceration; it forces lower courts to adjudicate cases where a new trial or a hearing should first be granted; and it unneces-

sarily burdens this Court's docket with a matter which could be adequately dealt with in lower courts. Petitioners therefore believe that they were entitled to full disclosure after plenary Justice Department review of whether eavesdropping occurred despite no proven federal incident of eavesdropping, and further, that such disclosure should have been made immediately when sought.

CONCLUSION

For the foregoing reasons, this joint petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—September Term, 1967.

(Argued February 23, 1968 Decided March 25, 1968.)

Docket No. 31391

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN FRANZESE, also known as "Sonny," WILLIAM DAVID CRABBE, also known as "Red," JOHN MATERA, also known as "Johnny Irish," NICHOLAS POTERE and JOSEPH M. FLORIO, also known as "Whitey,"

Appellants.

Before:

FRIENDLY and SMITH, *Circuit Judges,*
and GIGNOUX, *District Judge.**

Appeals from a judgment of the District Court for the Eastern District of New York, Jacob Mishler, *Judge,* convicting five defendants, after a verdict, on three substantive counts and a conspiracy count relating to bank robberies. Affirmed.

* Of the District Court of Maine, sitting by designation.

MAURICE EDELBAUM, New York, N. Y. (Lawrence K. Feitell, of Counsel), *for Appellant John Franzese.*

PHILIP VITELLO, New York, N.Y. (Lawrence K. Feitell, of Counsel), *for Appellant Joseph M. Florio.*

WILLIAM L. LYNCH, New York, N. Y., *for Appellant William David Crabbe.*

RAYMOND A. BROWN, Jersey City, N. J., *for Appellant John Matera.*

AARON J. JAFFE, New York, N. Y., *for Appellant Nicholas Potere.*

JEROME C. DITORE, Ass't U. S. Attorney (Joseph M. Hoey, U. S. Attorney for Eastern District of New York), *for Appellee.*

FRIENDLY, *Circuit Judge*:

Five defendants, Franzese, Crabbe, Matera, Potere and Florio, appeal from convictions, after a verdict, in the District Court for the Eastern District of New York on two counts of an indictment, returned in April, 1966, charging robbery of two federal savings and loan associations on Long Island by placing lives in jeopardy in violation of 18 U. S. C. §2113(d), a count for receiving currency and travelers' checks taken from a bank in Utah whose deposits were insured by the Federal Deposit Insurance Corporation in violation of 18 U. S. C. §2113(c), and a count for conspiring to engage in bank robberies in violation of 18 U. S. C. §371.[1] A chart in the margin shows the counts on

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[1] Judge Mishler granted a change of venue from Brooklyn because of pre-trial publicity; on the consent of all the defendants the trial was held in Albany.

which various defendants were convicted and the sentences imposed—some being very heavy ones.[2]

The prosecution had some unusual aspects, of which defendants have properly made much both at trial and on appeal. None of the appellants is claimed to have been present at any of the bank robberies here charged. The Government's case against them rested almost entirely on the testimony of four confessed participants—Smith, Parks, Cordero and Zaher—who cast the defendants in the role of behind-the-scenes operators of a nationwide bank rob-

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[2]

Count	*Bank*	*Defendants*	*Sentence*
2 Robbery of a savings & loan ass'n by placing lives in jeopardy. 18 USC §§2113(d) and 2.	Federal Savings & Loan Queens Co.	Franzese	25 years & $10,000
		Potere	15 years
		Florio	15 years
4 Robbery of a savings & loan ass'n by placing lives in jeopardy. 18 USC §§2113(d) and 2.	United Savings & Loan Ass'n, Oceanside, L. I.	Franzese	25 years & $10,000 (consecutive with #2)
		Potere	15 years (concurrent with #2)
		Florio	15 years (concurrent with #2)
7 Receiving stolen currency and travelers checks from a federally insured bank. 18 USC §§2113(c) and 2.	First Security Bank of Utah, Salt Lake City, Utah	Franzese	10 years (concurrent with #2 and #4)
		Crabbe	5 years (concurrent with #8)
		Matera	5 years (concurrent with #8)
		Potere	10 years (concurrent with #2, #4 and #8)
		Florio	10 years (concurrent with #2, #4 and #8)
8 Conspiracy to rob federally insured banks. 18 USC §§371 and 2.	Queens Co. Sav. & Loan	Franzese	5 years (consecutive with #7, concurrent with #2 and #4)
	Oceanside Sav. & Loan	Crabbe	5 years (concurrent with #7)

very business.[3] Franzese was the general manager; Potere was the procurer and explicator of plans of the banks and took general charge of logistics; Florio assisted in these operations and in weapon procurement; and Matera and Crabbe played lesser parts. What is more troubling is that three of the Government witnesses—Smith, Parks and Zaher—had previously depicted Anthony Polisi, owner of the Aqueduct Motor Inn in Queens, as the master-mind of the same enterprise and had so testified in a trial in January, 1966, wherein Anthony and his son Salvatore were convicted, in contrast to the testimony of Smith, Parks and Cordero at the instant trial that Anthony's services after mid-July, 1965, were in storing weapons and furnish-

Bank	*Defendants*	*Sentence*
Holyoke Nat'l Bank	Matera	5 years (concurrent with #7)
First Security Bank of Utah	Potere	5 years (concurrent with #2, #4 and #7)
Banco de Ponce (Brooklyn)	Florio	5 years (concurrent with #2, #4 and #7)
East Tremont Sav. & Loan		
United Industrial Bank (Brooklyn)		
Lafayette Nat'l Bank (Suffern)		
Manufacturers Hanover Trust Co. (Brooklyn)		
Suffolk Franklin Savings Bank		
Franklin National Bank (Great Neck)		
Certain Banks in California		

[3] The only other evidence of importance adduced by the Government was testimony by the lawyers who had represented Parks and Cordero after their arrests to the receipt from Potere of $1100 for Parks and $960 for Cordero—this to be used for attorneys' fees and bail and for a payment of $500 to Mrs. Cordero.

ing a meeting place. This was substantially what Cordero, who had not been called as a witness against the Polisis, had said in statements to the FBI shortly after his arrest on September 30, 1965.[4]

While the testimony of the four participants was exceedingly detailed and circumstantial—indeed therein lay its strength—we shall state only so much as constitutes necessary background for the legal contentions raised on appeal: The quartet, dissatisfied with Anthony Polisi's management, were summoned to a meeting at the Aqueduct Motor Inn on an evening in late July 1965, attended by all five appellants. Franzese announced that he was taking over, or a 50-50 basis, and that work orders would be issued by his four associates from time to time. Matera added that the arrangements included money for bail and for lawyers in the event of arrest, but that "ratting on anybody is completely out of the question because we will get you." Franzese confirmed the former comforting as-

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[4] In fact the inconsistency was not quite so great as appellants argue. The indictment in the *Polisi* case had three counts. Count One charged the robbery of the Central Queens Savings & Loan Ass'n on July 7, 1965, Count Two charged the robbery of the same institution by putting persons in danger, and Count Three charged a general conspiracy to rob both the Central Queens institution and the Queens County Federal Savings & Loan Ass'n on July 30, 1965, one of the robberies charged in the instant indictment. The evidence at the Polisi trial also included a robbery of the Jamaica Savings & Loan Ass'n on July 13, 1965. The testimony at the Polisi trial as to the robberies of July 7 and 13, both antedating a meeting hereafter described where Franzese is alleged to have taken over, is consistent with the story told by the Government's witnesses in this case; the conflict comes with the robbery of the Queens County Federal Savings & Loan Ass'n on July 30. This court affirmed the Polisis' convictions from the bench in November, 1966; the Government did not disclose its new information as to Anthony's less significant role in the Queens County Savings & Loan robbery.

surance and made known that his services included the stealing of cars to be used in the robberies and that, after a reasonable period of success, the robbers could cease their robbing and he would act as an investment counselor for them.

Another meeting occurred toward the very end of July. At the first phase, attended by Potere, Florio and Cordero, Franzese announced the acquisition of plans of five banks, including the Queens and Oceanside banks the later robberies of which were charged in substantive counts of the indictment. These plans had been supplemented with an indication of the get-away route and the location for the cars to which the robbers would switch after abandoning the get-away cars. There were renewed assurances about bail and lawyers and confirmation of the financial split. Later the participants other than Franzese adjourned to the Aqueduct Motor Inn, met with Parks, Smith and Anthony Polisi, and arranged for all but Polisi to reconnoiter the five banks the next day. After a dress rehearsal conducted by Florio in which the get-away driver, Anne Messineo, was introduced, Cordero, Parks and Smith robbed the Queens County Federal Savings and Loan Association on July 30, 1965, with disappointing results due to their failure to enter the vault. After a similar prelude the trio robbed the United States Savings and Loan Association in Oceanside, Long Island, on August 13, 1965, again with less than spectacular success.

We pass over activities planned for banks in Massachusetts, leading to the robbery of the Holyoke National Bank in Chicopee, accomplished on August 31, by Smith, Parks and Cordero, again without entering the vault, wherein Smith's girl friend Carol Scalzo and Salvatore

Polisi played supporting roles. Early in September, Franzese directed that activities be transferred to Denver and Salt Lake City. Cordero was to take his wife and Smith was to take Carol. Crabbe, who now reappeared, asked leave to go along, but Franzese declined because of needing him closer to home. After the kind of contretemps happily characteristic of such ventures, the two couples and Parks arrived in Denver behind schedule, the men robbed the bank on a Saturday rather than the appointed Friday for the truly meagre haul of $300, and all proceeded to Salt Lake City. Monday brought better luck there—$33,000 in cash and some travelers' checks. Desire of the robbers to alter the agreed split led to a meeting between them and Franzese, Florio, Matera and Crabbe at the Sky-way Motel in Queens. Florio told Franzese the trio had offered only $6000 plus the travelers' checks as his share. Crabbe counted the cash; Matera examined the checks, assured Franzese there would be no trouble in getting rid of them, and put them in his pocket. Somewhat surprisingly, Franzese did not cavil overmuch at the unilateral change in terms, although taking a sterner tone for the future. There was talk of California and some preliminary observations were later made on Long Island and in Brooklyn, but time was running out for the four robbers. Parks and Smith were arrested on September 30, Cordero on October 1, and Zaher, whom Matera had warned not to be around, on October 8. The promised immediate succor was not forthcoming, save as indicated in footnote 3 and for payments of $200 by Anthony Polisi to Zaher and of $50 by Potere to Smith.

Sufficiency of the Evidence

Matera and Crabbe are the only appellants to challenge the sufficiency of the evidence, and they do this solely with respect to Count 7 for receiving property stolen from the Utah bank. The evidence of their activities at the division of the loot meeting was sufficient for submission to the jury, particularly when this is taken in the light of evidence that we have recounted and of more that we have not. In any event the point is immaterial in view of the concurrent sentence on the conspiracy count. *Lawn* v. *United States,* 355 U. S. 339, 359, 362 (1958). We likewise reject Matera's argument that the court committed reversible error in refusing to charge he was entitled to an acquittal if the jury believed testimony adduced by him to show that he was sojourning with his wife and a Mr. and Mrs. Scotto at a resort in the Poconos from July 17 to July 24—a period including the date of the organization meeting which, along with the meeting on the robbers' return from Salt Lake City, constituted his sole proven participation in the crimes. The judge had properly instructed as to reasonable doubt and the jury manifested its realization of the importance of the alibi evidence by asking for a rereading of the direct testimony of Mrs. Matera, Mrs. Scotto and a Mrs. Principe, a friend who had also been at the resort. Having heard these witnesses, the jury evidently chose not to credit them.[5] That was its prerogative.

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[5] Matera's claim that the trial judge unfairly discredited a fourth witness, the owner of the hotel, who had testified to Matera's room reservations, by asking whether there were records that would show Matera's presence in the dining room, is without basis. The room records alone would not negate Matera's attendance

Appendix A—Opinion of United States Court of Appeals

The Government's Rehabilitation of Its Witnesses

The point most strongly pressed concerns the extent to which the Government was allowed to rehabilitate its witnesses after impeachment based on their failure to mention the defendants in statements given the FBI on their arrest and their testimony before the grand jury which indicted the Polisis and at the Polisi trial. The problem first arose in the case of Smith, the Government's lead witness. In his grand jury testimony against the instant defendants, which had been furnished defense counsel before he took the stand, Smith had been asked to account for the discrepancy between it and his failure to include the defendants in the information previously given the Government and his testimony in the Polisi proceedings. He answered:

> "Because, as far as I was concerned, I was ready to go and take my just punishment. They would look out for my family and put up the bail money, and try and get me back out. And they just didn't do it. And I felt I didn't owe them nothing no more."

Appellants hammered away at Smith on the basis of his long failure to include them in his list of culprits and his fixing of managerial responsibility in the elder Polisi, see fn. 4.

The Government then made known to the court that it proposed to rehabilitate Smith by showing that his previous silence as to the defendants was due to fear. After requesting counsel to prepare memoranda over a weekend, Judge Mishler said that his own search had led him tentatively to conclude that a witness may explain an in-

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at the evening meeting in Queens and it was important for everyone, including Matera, to know whether anything more was available.

consistency on the basis of fear even if his doing so imparts evidence of another crime, but that the trial judge has an obligation to allow "only so much . . . as will explain his fears" and to "exclude any other matter that . . . will lead the jury away from these issues and in effect decide the character or other crimes of these defendants." After much discussion it was decided to conduct a hearing outside the presence of the jury, at which Smith would explain the basis of his fears.

Smith's explanations proved exceedingly colorful—so much so that the judge felt it necessary to impose limitations on what the prosecution could elicit before the jury. He also carefully instructed the jury as to the bearing of the evidence it was about to hear. He explained that some of this would relate to issues not in the case and also would be hearsay if offered as proof of the facts stated, and that "the real issue is did this witness believe what he heard and what he understood generally and was it for that reason that he failed to name these defendants at the previous times and on the previous occasions."

Smith then testified that when he gave statements to the FBI on October 14, 1965 and evidence at the Polisi trial in January 1966, he feared for his life if he were to implicate the defendants. He cited the statement by Matera at the organization meeting as to what would happen if anyone informed. He said also that Carol Scalzo, his girl friend, warned him, while in jail, that Potere was aware that he had not informed on the instant defendants and had said Smith must know what would happen to himself if he did.[6] He continued that on October 14, 1965, he

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[6] We find no merit in appellants' complaint of the Government's failure to call Scalzo. She was not in custody and was equally available to appellants.

was told by Parks, Zaher and Cordero that they had made no statements against these defendants, and that the four discussed the threat of bodily harm or death if Smith informed. Smith further stated that he feared death in prison if he informed; that when he joined the conspiracy he was promised money for lawyers, bail and his family, benefits he would lose if he informed; that he believed his family would be harmed if he implicated the defendants; that in September 1965, he asked Zaher if the latter would inform on the defendants if arrested and Zaher had said, "No, I know better than that, I have a family out there"; and that while in jail in January 1966, Zaher told Smith that a prison guard, Gucci,[7] brought him a message warning Zaher that if he informed on the defendants, he would wind up dead. After having followed the same procedure as with Smith, the judge allowed Cordero to testify that his failure to mention the defendants in statements given the FBI and testimony before the grand jury in October 1965 was due to fear for his safety both in and out of prison and for his family, based on conversations with Franzese, Crabbe, Florio and Parks, and also to apprehension that he would lose money for bail, lawyers and his family if he informed. Parks was similarly permitted to explain that his failure to mention the defendants in his FBI statements of October 1965 and his testimony before the Polisi grand jury and at the Polisi trial

[7] Gucci was produced by the Government for appellants, who interviewed him but chose not to call him, avowedly because his credibility would not withstand a federal conviction for violating his duties as a prison guard.

was due to fear of bodily harm, based on conversations with Matera and Crabbe and with inmates of the Federal House of Detention.[8]

Appellants do not seriously challenge the basic principle that a witness impeached on the basis of prior inconsistency "may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it," 3 Wigmore, Evidence §1044, p. 737 (3d ed. 1940)—a rule we recently applied in *United States* v. *Scandifia*, —— F. 2d ——, —— (2 Cir. 1968). Fear of the consequences of plain speaking is such a circumstance, as many cases have held, see, in addition to *Scandifia*, *People* v. *Chapleau*, 121 N. Y. 266, 277 (1890); *People* v. *Buchalter*, 289 N.Y. 181, 202 (1942); *Hendrickson* v. *Commonwealth*, 23 Ky. L. Rep. 1191, 1194-95, 64 S. W. 954, 956 (1901); and *Bradford* v. *State*, 90 So. 2d 96, 97-98 (Ala. 1956). It is likewise clear that the witness may explain his fear as induced by a threat communicated by an intermediary, *United States* v. *Scandifia*, *supra*, —— F. 2d at ——, n. 8; *State* v. *Minton*, 68 S. E. 2d 844, 850 (N. C. 1952), although the opposing party is entitled to an instruction, here given by the judge of his own motion, that the intermediary's statement is not evidence that the threat in fact was made by the alleged source. While rehabilitation of this sort may well have a spill-over effect, the process is essential to development of the truth and reliance must be placed on trial judges to prevent unfair tactics by the prosecution.

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[8] Zaher was not permitted to testify with similar elaboration since there was no inconsistency between his evidence at the instant trial and his prior statements—Zaher having been absent from July 21 until shortly before the arrests.

Appellants rely on two main contentions to escape these settled rules. One is that their counsel were led into cross-examining on the basis of prior inconsistency, with consequent alleged devastating effect of the rehabilitation on the defendants, by Smith's incomplete explanation before the grand jury which we have quoted. The other is that it was error to allow the witnesses to testify generally to a state of fear as distinguished from specific incidents emanating from the defendants. We find no force in either argument.

Faced with the extremely circumstantial accounts given by the four witnesses, with no material inconsistencies among them and no contradiction save for Matera's alibi evidence as to his absence in the Poconos at the time of the organization meeting, appellants' counsel could not have afforded to rely merely on the witnesses' bad records and the usual attacks on the testimony of accomplices with much to gain by concocting a story the prosecution would like to hear. Development of the witnesses' prior inconsistency was the only real hope for arousing reasonable doubt—as evidenced by counsel's continued use of this tactic on Cordero and Parks, who had made no statement like Smith's before the grand jury, after experience with Smith revealed the riposte this would almost certainly attract. We thus cannot take seriously appellants' argument that it was Smith's statement that led their counsel into a trap.

In any event none of this would have legal consequence unless the Government was in some way culpable. Appellants say it was. They cite a statement by the prosecutor in colloquy that he "had a conversation with each of these

witnesses before they went into that grand jury and said 'Don't mention this organized crime in there; don't mention this killing business; don't mention the fear element' and the same when these people have been put on the stand." Needless to say, we strongly disapprove a prosecutor's ever advising a witness to tell less than the whole truth. But it would be wrong to take the quoted statement, made in the heat of courtroom argument, as an admission that the prosecutor had done this. We read his warning to the witnesses rather as a caution, commendable in itself, against volunteering information concerning the defendants' criminal background not responsive to specific inquiries. If the prosecutor is to be faulted at all, it would be rather for allowing Smith's answer to the grand jury to stand without amplification, assuming as we do that he then knew how incomplete it was. But it would be calling for more prescience than prosecutors can reasonably be expected to possess to think that this omission, favorable to the accused at the time, was intended to lure them to their destruction at the trial.

Several of the authorities previously cited sustain the proposition that an impeached witness may explain a previous inconsistency on the basis of fear generally, *People* v. *Chapleau, supra; Bradford* v. *State, supra,* leaving it to the impeacher to inquire into the basis if so advised. Moreover the witnesses here did cite chapter and verse for their fear and the examinations conducted outside the presence of the jury demonstrated they could have given a good deal more. To the extent that the judge prevented proof

of specific incidents, the defendants were the gainers;[9] his conduct of this novel trial problem deserves commendation rather than the censure the defendants urge.

Mrs. Cordero

Appellants make a number of arguments relating to Mrs. Cordero. An FBI report given to defense counsel had recorded Cordero as stating that his wife had driven one of the three switch cars following the Oceanside bank robbery of August 13. On cross-examination Cordero denied having said this, although he stated that his wife had innocently participated in the robbery and elaborated on redirect that she had been waiting in the "switch car point" area. After the Government rested, appellants stated they intended to call FBI Agent Murphy to ascertain the name of an informer whose statement that Mrs. Cordero drove the car used in the Oceanside robbery had afforded the basis for an affidavit by Murphy leading to her arrest. On a *voir dire* examination Murphy said that the informer had no part in the robberies and that the information as to Mrs. Cordero's ownership of a car that took part in the robbery was in error. When the Government objected to Murphy's being compelled to divulge the name of the in-

[9] For example, Cordero was not permitted to testify that Franzese had admitted that he had ordered Ernie "The Hawk" Rupolo, who at one time testified against Vito Genovese, to be killed in gang-land fashion—shot, stabbed, tied up, put in cement, and thrown into Jamaica Bay—and that Crabbe had said he was personally going to kill a fence who had testified against him, just as he had killed the "Hawk." He also was not permitted to testify that Crabbe had threatened to kill Mrs. Cordero because Crabbe thought she was giving information to the "cops" and that Franzese had ordered Cordero to get her out of town.

former, defense counsel argued this was necessary to enable them to attack the credibility of Cordero's statement that his wife had not participated in the robbery and to demonstrate a further reason for Cordero's seeking the Government's favor.[10] Considering these issues to be "purely collateral," the judge thought the benefit of revelation to the defense was outweighed by detriment to the Government in its investigation of crime and by danger to the informer.

On what was put to him the judge's decision was well within the discretion necessarily allowed under the controlling ruling in *Roviaro* v. *United States,* 353 U. S. 53, 62 (1957). Evidence that a witness had lied in refusing to implicate an unrelated person not indicted would be inadmissible even under the test of "collateralness" approved by Wigmore, perhaps more liberal than that generally applied: "Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?" 3 Evidence, §1003 at p. 657; see *Smallfield* v. *Home Ins. Co. of New York,* 244 F. 2d 337, 341 (9 Cir. 1957); the case would have stood differently in this regard if Anne Messineo had been on trial and her counsel had sought the informer's testimony to prove that Mrs. Cordero rather than Anne drove the get-away car. The sole basis for admissibility of evidence of Mrs. Cordero's participation would thus have been in furnishing a

[10] Defense counsel also urged that testimony by the informer might cast a sinister light on the Government's return of money to Mrs. Cordero—a subject discussed below. However, apart from other considerations, the information related to the Oceanside robbery whereas the suspicion as to the money was primarily as to the later Salt Lake City robbery.

further indication of Cordero's bias and corruption. While evidence would have been receivable for that purpose, see id. §1005(2), the jury had already heard so much on that subject, including Cordero's own rather equivocal testimony as to his wife's involvement, which the judge expressly called to their attention in his charge, that the incremental value of evidence by the informer was outweighed by the opposing considerations, especially the great dangers to him indicated by what the "fear" testimony of Smith, Cordero and Parks had revealed.

In brief and argument before us, appellants have developed a somewhat different theory as to the use to which they might have put the informer. Stressing the Government witnesses' opportunities to develop a consistent story while living together in jail, they argue that, as said in Franzese's brief, "it was of the utmost importance to the defense to show that the exclusion of Mrs. Cordero by the connivance of the gunmen was related, part and parcel, to the objective of keeping Mrs. Cordero out of the case lest she become an uncontrollable link in the government's chain of proof." The suggestion, apparently, is that if the informer had implicated Mrs. Cordero, the defendants might have called her or the Government might have considered itself forced to call her, with consequences no one now can tell. Apart from the fact that nothing prevented the defense from calling Mrs. Cordero, it suffices that this theory was never presented to the trial judge.[11]

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[11] The trial court examined the FBI intra-office memoranda as to the informer and found they were not producible at the instance of the defendants. We have likewise done this and agree. We add that the information as to Mrs. Cordero is exceedingly vague.

We have been more concerned over another episode. When Cordero was arrested in his house on October 1, 1965, the special agents found a plaid suitcase containing some $10,000 in currency. He then told the agents this money belonged to his wife but at arraignment altered his story and said it was obtained by him from bank robberies. At the trial, although admitting that at one time he told the agents that all of the money was the proceeds of his bank robberies, he stated that only $2000 constituted such proceeds.

The cause of our concern is that prior to trial all this money, except for $200 in $20 bills identified as having come from the Salt Lake City robbery, was returned to Mrs. Cordero. This was done pursuant to order of Judge Mishler, on a motion by Mrs. Cordero supported by her affidavit that "the monies are not the fruits of a robbery and belong to deponent who requires this cash immediately for support of her family," and an affidavit by the prosecutor that, except for the identified bills, "the government has no evidence to show the remaining monies are not those of the aforesaid Eleanor Cordero, and has no other claims for this money from any other party." Conceding as they must that the return of the money was fully before the jury,[12] appellants argue on appeal that this was "dirty

[12] Defense counsel also made considerable point in summation that after the Polisi trial Smith got back a car, which he sold for some $800, and that at some time Parks got back a Cadillac, purchased for $5000 after the Salt Lake City robbery, which he sold for some $3500. There was no evidence that either car had been used in the robberies or that Smith's car had been purchased with their proceeds. Parks claimed he had bought the Cadillac with money won at the race track and from card games; naturally the defense questioned this but the evidence was inconclusive. Although defendants now complain of the charge in respect of these matters, no exception was taken at the trial, and there surely was not "plain error."

business'' requiring at minimum a new trial in which any testimony by Cordero would be excluded. We must confess that the Government's attitude strikes us as rather complaisant; the combination of the presence of bills identified as stolen from the Salt Lake City bank and Cordero's admissions would at least have justified a demand on its part for a hearing at which Mrs. Cordero would have to prove her case by live testimony. But we see no basis for invoking our supervisory powers when the Government submitted the issue to the trial judge, even though we might have been less inclined to order immediate return of the money.

Evidence Concerning Events Subsequent to September 30, 1965

Count 8 of the indictment charged that "On or about and between the 15th day of July 1965 and the 30th day of September 1965, both dates being approximate and inclusive," the defendants conspired to rob various banks, "including but not limited to" a list therein set forth. The indictment named not only the banks proved to have been robbed and others whose robbery had been first considered and then abandoned before September 30 but still others, notably the Great Neck branch of the Franklin National Bank, the Atlantic Ave. branch of the Manufacturers Hanover Trust Company and unknown banks in California that were still on the active list when Parks and Smith were arrested on September 30. Over defense objection the Government was allowed to offer certain evidence as to events somewhat subsequent to that date, notably a $50 payment

from Potere to Smith, a meeting wherein Polisi gave Zaher some money and told him to get rid of his guns and stay away, and, most damaging, telephone calls and correspondence between the lawyers for Parks and Cordero and Potere to obtain money and checks from the latter, see fn. 3.[13]

It is plain enough that but for the September 30 date in the indictment all this evidence would have been competent. The testimony supported the view that the bank robbery conspiracy was a continuing one, with the four arrests merely a rift in the lute so long as the prisoners did not identify their associates who remained at large. The furnishing of bail and lawyers had been an agreed part of the conspiracy from the beginning, designed in part to permit its continuation if mishap should befall any member. Defendants are thus mistaken in relying on such well-known decisions as *Krulewitch* v. *United States,* 336 U. S. 440 (1949); *Lutwak* v. *United States,* 344 U. S. 604 (1953); and *Grunewald* v. *United States,* 353 U. S. 391 (1957), wherein the Court rejected Government efforts to prolong the period during which declarations are deemed in furtherance of a conspiracy and thus admissible against all members or to extend the date for starting the statute of limitations, on the basis of an implied subsidiary conspiracy to conceal a crime fully accomplished. As said in *Grunewald, supra,* 353 U. S. at 405, "[A] vital distinction must be made between acts of concealment done in fur-

[13] Most of these incidents were in October. The sole exception was an exchange of communications between Parks' lawyer and Potere in November and December; the court allowed this only as against Potere but appellants contend the limitation had no practical effect.

therance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." Cf. *Ingram* v. *United States,* 360 U. S. 672, 679 n. 10 (1959). Here the jury could find that the bank robbery conspiracy remained an on-going enterprise after September 30 notwithstanding that several members were in custody. While the Government conceded that their participation had terminated and any declarations by them would thus be inadmissible against others, none were offered, and the judge charged that acts or declarations of other members could be considered only if the jury found the conspiracy continued.[14]

The case is thus the common one of a variance, and a quite inconsequential variance at that. The September 30 date in the indictment was stated to be "approximate," and the overt acts included two September 29 conversations between Potere and Parks as to contemplated inspections and subsequent robberies, which Parks' arrest did not foreclose. Defendants do not seriously contend that proffer of the post-September 30 evidence subjected them to unfair surprise, and there is no appreciable risk of their convictions failing to bar subsequent prosecution for the minor acts after that date. The tests laid down in *Russell* v. *United States,* 369 U. S. 749, 763-64 (1962), are thus amply satisfied.

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[14] Insofar as this charge lumped acts with declarations, it was too favorable to the defense. See *Lutwak* v. *United States, supra,* 344 U. S. at 617-19; *United States* v. *Costello,* 352 F. 2d 848, 853-54 (2 Cir. 1965), vacated on other grounds, —— U.S. —— (1968). Here the post-September 30 evidence seems to have consisted almost solely of acts.

Instructions to the Jury

The only point as to instructions that requires discussion concerns the familiar subject of reasonable doubt. The charge on this point was unexceptionable and without exception, the judge having defined a reasonable doubt to be a "fair doubt . . . based on reason and common sense and reasoning from the state of the evidence" and proof "beyond a reasonable doubt" to be "such as you would be willing to rely and act upon in the most important of your affairs." The difficulty arose when the jury, during its deliberations, requested an explanation of "beyond a reasonable doubt to a moral certainty." The jury had gotten hold of that confusing phrase because the judge had allowed Franzese's counsel to say, in summation, that the Government must prove guilt "beyond a reasonable doubt to a moral certainty."

The Court answered the request by saying:

> "It is rarely possible to prove anything beyond all doubt. The Law requires that the Government prove its case beyond all reasonable doubt. When we talk about proof beyond a reasonable doubt that convinces you to a moral certainty of the defendant's guilt, when we use the term moral certainty, we do not mean that you reach your decision other than by means of reason. It again means that the Government must prove its case beyond a reasonable doubt, and as I intended to convey, an understanding of when we say to a moral certainty. Now the term 'proof beyond a reasonable doubt' in my humble opinion defies further definition than that I have already given you. I hope what I have given you satisfies you.

You may retire for further deliberation on the matter before you."

Appellants objected to this instruction and requested the court to reread its main charge on reasonable doubt. The judge declined on the ground that the jury had not requested it, but offered to recall them and instruct that what he had just said must be placed in context with the entire charge. Appellants declined this offer.

While it would have been better if the judge had complied with appellants' request, it would be quibbling to reverse on that score. In effect the judge told the jury that proof "to a moral certainty" and proof "beyond reasonable doubt" were equivalents, cf. *United States* v. *Johnson*, 343 F. 2d 5 (2 Cir. 1965), and reaffirmed his original charge as to the latter. If appellants had accepted his offer, the jury would very likely have asked to have the original charge reread and any possible confusion would have been dispelled. Even without that, we find nothing to make us fear that the jury was unaware of the heavy burden of persuasion placed upon the Government.

Request for an Order to the Department of Justice to Make an Investigation With Respect to Wiretap Evidence

Prior to trial appellants applied for production of the tapes or records of a wiretap in the Aqueduct motel conducted by the New York City Police Department. The Government reported to the court that the Police Department had no tapes or records; that the Government had had no knowledge of their existence until this was revealed by the defense at the Polisi trial; and that neither it nor its agents had received any information, leads or

evidence from these tapes or any other electronic device. Appellants then dropped the inquiry.

Although nothing in the trial suggested this to have been a misrepresentation, appellants now ask us to direct the Department of Justice to conduct a comprehensive review of its records to determine whether the Government took part in or is aware of any other incidents of wiretapping or electronic eavesdropping. We see no reason for embarking on what, so far as we can see, would be a policy of requiring such an investigation in every criminal case, even when there is not the slightest reason to suspect offensive conduct by the Government. The recent decision in *Kolod* v. *United States*, —— U. S. ——, 36 L. W. 3306-07 (1968), further argument granted March 18, 1968, called to our attention at oral argument, lays down no such mandate. The Supreme Court there held that when the Government admitted monitoring a defendant's conversation, it could not unilaterally determine that nothing revelant had been heard.

We have fully considered other points raised by appellants but believe they do not warrant discussion. We reject the suggestion of misconduct on the part of the trial judge. Judge Mishler presided over this long and hotly contested trial with exemplary fairness and also with the skill in the conduct of difficult multi-defendant prosecutions we have come to expect from him.

The judgments of conviction are affirmed.

APPENDIX B

Judgment and Commitment Appealed From

(U.S.A. v. John Franzese)

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

No. 66-CR-161

UNITED STATES OF AMERICA

—v.—

JOHN FRANZESE, also known as "Sonny"

On this 14th day of April, 1967 came the attorney for the government and the defendant appeared in person and with counsel

IT IS ADJUDGED that the defendant has been convicted upon a verdict of guilty of the offense of violating T-18, U.S. Code, Sec. 2113(d) & 2, 2113(c) & 2 and 371 & 2, that on or about and between July 15, 1965 and Sept. 30, 1965, both dates being approximate and inclusive, the defendant, with others wilfully & knowingly conspired to take and receive monies and things of value by force, violence and intimidate from the person and presence of employees of banks, which monies and things of value were in the care, custody, control, management and possession of the aforesaid banks, and to place in jeopardy the lives of the

bank employees as well as the lives of any other persons present by the use of dangerous weapons as charged in counts 2, 4, 7 & 8 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment on count 2 for a period of 25 years pursuant to 18 USC § 4208(a)(2) and to pay a fine of $10,000; On count 4 for a period of 25 years, pursuant to 18 USC § 4208(a)(2), said period to be consecutively to the term imposed under Count 2, and to pay the sum of $10,000; On Count 7 for a period of 10 years, pursuant to 18 USC § 4208(a)(2), to run concurrently with the sentence imposed under Counts 2 and 4; On Count 8 for a period of 5 years, pursuant to 18 USC § 4208(a)(2) to run consecutively to the term imposed under Count 7 but concurrently with the term imposed under Counts 2 and 4.

Appendix B—Judgment and Commitment Appealed From
(U.S.A. v. John Franzese)

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JACOB MISHLER
United States District Judge

APPENDIX C

Judgment of Affirmance of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-five day of March one thousand nine hundred and sixty-eight.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges,
HON. EDWARD T. GIGNOUX,
District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN FRANZESE, a/k/a "Sonny"; WILLIAM DAVID CRABBE, a/k/a "Red"; JOHN MATERA, a/k/a "Johnny Irish"; NICHOLAS POTERE, and JOSEPH M. FLORIO, a/k/a "Whitey"

Defendants-Appellants,

ANNE MESSINEO, a/k/a "Anne The Singer", et al,

Defendants.

Appendix C—Judgment of Affirmance of United States Court of Appeals

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX D

Statutes Involved

TITLE 18 U.S.C.

§ 2113. BANK ROBBERY AND INCIDENTAL CRIMES

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value

not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws

of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

* * * * *

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any "insured institution" as defined in section 401 of the National Housing Act, as amended, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act. As amended Apr. 8, ????, c. 164, 66 Stat. 46; Sept. 22, 1959, Pub.L. 86-354, § 2, 73 Stat. 639.

* * * * *

§ 2. PRINCIPALS

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

* * * * *

§ 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. 3500

* * * * *

§ 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States

to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d), of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub.L. 85-269, Sept. 2, 1957, 72 Stat. 595.

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U.S. CONSTITUTION—AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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Appendix D—Statutes Involved

U.S. Constitution—Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.